Supreme Court, U.S.
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No. 91-4

In The

Supreme Court of the United States

October Term, 1991

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL NO. 12, AFL-CIO,

Petitioner,

v.

CARROLL WILSON, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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22

QUESTION PRESENTED

Whether a state law claim for fraud is preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, merely because the tortfeasor is employed by a labor union, where the labor union does not represent the employer victim's employees, and where the fraud in question takes place completely outside the context of collective bargaining and has nothing to do with the ordering or development of labor relations or working conditions?

LIST OF PARTIES TO THE PROCEEDING

The following list comprises all parties to the underlying District Court action, and all related corporate entities pursuant to Rule 29.1.

Operating Engineers Pension Trust

Operating Engineers Health and Welfare Fund

Operating Engineers Vacation-Holiday Savings Trust

Operating Engineers Training Trust

Carroll E. Wilson

Patricia J. Wilson

Wilson Equipment, a Partnership

C. E. Wilson Corporation

International Union of Operating Engineers, Local No. 12

Eugene Kinsey

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

ARGUMENT: THERE IS NO REASON TO GRANT CERTIORARI 5

1. THE SUPPOSED "SPLIT" IN THE CIRCUITS HAS NOTHING TO DO WITH THE RELEVANT ISSUE IN THIS CASE 6

2. GARMON PREEMPTION: THE RELATIONSHIP BETWEEN BAD FAITH BARGAINING UNDER THE NATIONAL LABOR RELATIONS ACT AND SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT IS NOT PROPERLY A SUBJECT OF THIS CASE 8

3. THE DECISION BELOW IS CORRECT: UNDER THIS COURT'S DEVELOPMENT OF SECTION 301, A STATE LAW FRAUD CLAIM ARISING COMPLETELY OUTSIDE ANY COLLECTIVE BARGAINING RELATIONSHIP AND NOT BASED IN ANY WAY ON THE CONTENT OF THE ALLEGED COLLECTIVE AGREEMENT IS NOT PREEMPTED MERELY BECAUSE THE TORTFEASOR IS EMPLOYED BY A LABOR UNION 11

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Allis-Chalmers v. Lueck, 471 U.S. 202 (1985) 12

Caterpiller, Inc. v. Williams, 482 U.S. ___, 107 S.Ct. 2425 (1987) 12

De Arroyo v. Sindicato de Trabajadores Packing, 425 F.2d 281 (1st Cir. 1970) 5

DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) 11

Dowd Box v. Courtney, 368 U.S. 502 (1962) 15

Electrical Workers v. Hechler, 481 U.S. 851 (1987) 14

John Deklewa & Sons, 282 NLRB 184 (1987), *enforced*, 843 F.2d 770 (3d Cir.), *cert. denied*, 488 U.S. 889 (1988) 8

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988) 4, 11, 15

Machinists v. Wisconsin Emp. Rel. Comm'n., 427 U.S. 132 (1976) 9

Richardson v. Communications Workers of America, 443 F.2d 974 (8th Cir. 1971) 5

Rozay's Transfer v. Local Freight Drivers, 850 F.2d 1321 (9th Cir. 1988), *cert. denied*, 409 U.S. 1030 (1989) 7

San Diego Building and Trades Council v. Garmon, 359 U.S. 236 (1959) 5

Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) 12

TABLE OF AUTHORITIES – Continued

Page

UAW v. Federal Forge, Inc., 583 F. Supp. 1350 (W.D. Mich. 1984) 5

United Steelworkers of America v. Rawson, ___ U.S. ___, 58 L.W. 4556 (1990) 13

STATUTES

29 U.S.C. § 158 8

Labor Management Relations Act § 301 ..... *passim*

National Labor Relations Act
§ 8 8

§ 8(a) 9

OTHER AUTHORITIES

BNA Daily Labor Report (March 5, 1987) 10

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The opinion of the Court of Appeals is reported at 915 F.2d 535 and is reprinted in the separately bound Petitioner's Appendix (hereafter PA) at pp. 1a-16a. The District Court entered findings of fact and conclusions of law, which are reproduced in Petitioner's Appendix.

JURISDICTION

Respondents agree with Petitioner's statement of the jurisdictional provisions. Respondents disagree that this

Court should exercise its discretion to grant certiorari in this unique, fact-specific case.

STATUTORY PROVISIONS INVOLVED

Respondents agree that the statutes cited by Petitioner are raised in its Petition.

STATEMENT OF THE CASE

The respondents are Carroll Wilson and his wife Patricia Wilson, who at the time of the events in question were the sole partners in a small grading business, Wilson Equipment (later incorporated as C. E. Wilson Corp.). ("Wilsons" shall refer to both Mr. and Mrs. Wilson as well as their partnership).

After a career in the Navy, Mr. Wilson retired and went into the grading business. The Wilsons slowly built up a small business, with Mr. Wilson running equipment and supervising the jobsite work and Mrs. Wilson handling the office and paperwork. In 1982 they employed two or three operators, none of whom were Union members. They had no agreement with any union.

This case arose on May 14, 1982 when the Petitioner's (the "Union" shall refer to Petitioner Local 12) Business Agent lied to Wilson in order to induce him to sign a piece of paper called an "Owner-Operator Agreement." The Wilsons were grading the site for a gymnasium, and they needed extra dirt. Mr. Wilson found excess dirt at a nearby job site being run by a general contractor called

Lyle Parks (the "General"). He cut a deal with the job superintendent for the General to haul away the dirt for free. This arrangement benefitted them both.

The General was not a signatory to any agreement with the Union, and did not require its subcontractors to operate under any union agreement. The Union's Business Agent knew this.

Nonetheless, the Business Agent approached Wilson and told Wilson that he could not work on the site. Wilson explained that he had the General's permission to remove the dirt. The Business Agent told Wilson that the General had said that Wilson must be "union" to work on the job, and that Wilson must sign an "Owner-Operator" form to run his own equipment on the job. There was no discussion about other jobs; there was no discussion about employees or terms and conditions of work. At this point, the Business Agent's first lie, the one at issue, was complete. He had lied to Wilson about the General's alleged statement that Wilson had to sign the Owner-Operator form.[1] The Business Agent admitted on cross-examination that he knew the General was *not* a union signatory, and did *not* require its subcontractors to be union.

Several expensive rented dump trucks were waiting to be loaded. Wilson was in a hurry. Wilson signed the Owner-Operator form on the hood of the automobile

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[1] The Business Agent then lied to Wilson about the effect of signing the form. This is the lie about whether the form would affect Wilson's status, the lie which the District Court concluded required interpretation of the form and therefore was governed by § 301. The second lie is not at issue.

beside them, relying on the Business Agent's representation that it was required. The entire dialogue took only a few minutes. Unbeknownst to the Wilsons, the Owner-Operator form purported to bind them to a Master Labor Agreement requiring payments to various Union trust funds.

In 1984, the trust funds filed suit against the Wilsons under § 301 for "breach" of the Owner-Operator form for failure to make contribution payments. The Wilsons cross-complained against the Union, alleging fraud.

The jury returned a verdict for the Wilsons against both the trust funds and against the Union. The jury found that there was no contract. The jury found that the Business Agent defrauded Wilson by lying about the need to sign the form to work on that job, and awarded the Wilsons $200,000.00 in damages for lost time and emotional distress. The jury also found that the Business Agent defrauded Wilson by lying about whether the agreement would change his status.

The Union appealed, claiming that the state law claim based on the lie about the Owner-Operator form being required for that job was preempted by § 301. The Ninth Circuit ruled, in a straightforward application of this Court's precedent, that the state law claim was not preempted because it did not require interpretation of the owner-operator form. (PA 9a-10a, quoting *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988).)

ARGUMENT: THERE IS NO REASON TO GRANT CERTIORARI

The Union urges certiorari based upon a supposed split in the circuits, *Garmon* preemption, and the argument that the Circuit Court was wrong. None of these rationales is convincing.

The supposed "split" is not only mythic, it has nothing to do with *this* case, and has never been briefed or addressed by the parties or the courts below.

Preemption by the National Labor Relations Act under *San Diego Building and Trades Council v. Garmon*, 359 U.S. 236 (1959), is not a possibility in this case because the Union was not the certified collective bargaining representative of the two or three operators the Wilsons employed.

The Ninth Circuit's decision on § 301 is in full accord with this Court's development of the law. Regardless, the outcome of the case would be the same because the Wilsons prevailed on their § 301 fraud claim as well as their state law claim, and any realistic view of § 301 would include damages for lost time and emotional distress.[2]

Finally, this is not a case of national importance or widespread application. It turns on its unique facts: an out-and-out lie perpetrated by one stranger on another,

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[2] *See, Richardson v. Communications Workers of America*, 443 F.2d 974 (8th Cir. 1971); *De Arroyo v. Sindicato de Trabajadores Packing*, 425 F.2d 281 (1st Cir. 1970); *UAW v. Federal Forge, Inc.*, 583 F. Supp. 1350 (W.D. Mich. 1984).

completely outside the context of any collective bargaining relationship. Unlike the cases relied upon by the Union, this is a situation where one party had not a clue that any kind of agreement purporting to regulate working conditions of employees was being proposed.

1. THE SUPPOSED "SPLIT" IN THE CIRCUITS HAS NOTHING TO DO WITH THE RELEVANT ISSUE IN THIS CASE.

The "split" in the circuits which the Union identifies does not deal with the relevant issue in this case – whether § 301 preempts a pendent state law claim for garden variety fraud merely because the liar happens to be a union business agent.

Not a single one of the cases cited by the Union in support of the "split" deals at all with § 301 preemption of state law claims. Rather, the cases discuss whether § 301 confers subject matter jurisdiction to examine the validity or existence of a collective bargaining agreement. No party contested that issue in our case. All parties, the Wilsons, the Union, and the trust funds, assumed that § 301 provides subject matter jurisdiction to decide the validity or existence of a collective bargaining agreement.[3] The issue was never briefed at the District or Circuit Court level.

Thus, since all parties are in agreement on the issue on which the Circuits are supposedly "split," this case is

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[3] The Wilsons had a § 301 fraud claim based on the Business Agent's second lie, as well as the pendent state law fraud claim under discussion.

not an appropriate vehicle for review of that issue. The "split" of which the Union complains, if it really exists, should be resolved in a case where the lower courts squarely faced the issue with the benefit of briefing and argument by the parties.

There is even a question as to whether the "split" really exists, for the reason explained by the Solicitor General in his *amicus* brief opposing *certiorari* in *Rozay's Transfer v. Local Freight Drivers*, 850 F.2d 1321 (9th Cir. 1988), *cert. denied*, 409 U.S. 1030 (1989) (*Rozay's II*), that the courts of appeals are moving toward a consensus that § 301 confers jurisdiction to adjudicate claims that collective bargaining agreements are invalid.[4]

There is no split in the circuits on the *relevant* issue: whether § 301 preempts a pendent state law claim for fraud arising completely outside the context of collective bargaining.

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[4] The Union's suggestion that the Solicitor General would plead for the application of § 301 to this case is unjustified. There are significant and decisive factual differences between our case and *Rozay's II*, the most important of which is that *Rozay's II* arose in the context of an established collective bargaining agreement and relationship. The Solicitor General did not have the facts of *this* case before him. The relevant point is that the Solicitor General correctly viewed the Circuit Courts as moving toward an accord on the issue of subject matter jurisdiction, which is *not* an issue raised by the instant case.

2. GARMON PREEMPTION: THE RELATIONSHIP BETWEEN BAD FAITH BARGAINING UNDER THE NATIONAL LABOR RELATIONS ACT AND SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT IS NOT PROPERLY A SUBJECT OF THIS CASE.

Section 8 of the National Labor Relations Act is typically the exclusive remedy for bad faith bargaining. The predicate to the application of Section 8 is the existence of a legally-required duty to bargain in good faith. 29 U.S.C. § 158. As the Ninth Circuit noted below, that issue does not arise here because there was no legal obligation to bargain (PA 10a-12a). A union cannot compel an employer to bargain with respect to employees the union does not represent. Here, the Union did not represent the Wilsons' employees.

Further, even if the Owner-Operator form is characterized as a pre-hire contract,[5] a creature unique to the construction industry, the NLRB and courts are clear that there is no duty to bargain over pre-hire contracts. In other words, federal law has no interest in compelling bargaining for such a contract, nor in regulating the terms of such bargaining. The only obligation relating to a pre-hire contract is to follow its terms for its duration. There is not even an obligation to negotiate for a successor agreement. *John Deklewa & Sons*, 282 NLRB 184 (1987), *enforced*, 843 F.2d 770 (3d Cir.), *cert. denied*, 488 U.S. 889

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[5] Even that characterization would be a shock to Wilson – all he knew was what the Business Agent told him – that the General required him to sign a form in order to run his machine on that job.

(1988). Where is the basis for preemption if the parties do not even have to talk about such a contract?

Most importantly, perhaps, the Union's high-flown characterizations of the Owner-Operator form as a "pre-hire contract" and the brief conversation between Wilson and the Union Business Agent as "bargaining" are both incorrect on the specific *facts* of this case. (*See* Ninth Circuit opinion, PA 11a-12a.)

The cases cited by the Union, *Parker*, *Serrano*, and *Kolentus*, have no application to our situation. All concern established, long-standing collective bargaining relationships between a union and employer. The obligation to bargain in good faith under Section 8(a) of the NLRA was clear. Each of those cases dealt with state law fraud claims claiming, essentially, that an employer had committed fraud in obtaining concessions in a collective bargaining agreement by representing that it would keep a plant open. None of those cases deal with the construction industry or pre-hire contracts. All deal with the obligation to bargain in good faith that exists between an employer and a union as the duly certified collective representative of a group of employees who have voted for such representation.[6]

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[6] *Machinists v. Wisconsin Emp. Rel. Comm'n.*, 427 U.S. 132 (1976), a *Garmon* preemption case cited by the Union in a footnote, is even farther removed from the facts of this case. There, the State of Wisconsin ordered a union to cease and desist from a partial strike. *Machinists* merely recognizes that a union has a right to strike for better wages and working conditions, as part of its right to use "economic weapons" when bargaining on behalf of its members for a successor collective bargaining agreement.

The Union's unsupported claim that the large number of multi-state agreements requires some vague decisional uniformity is disproved by none other than Robert Georgine, President of the AFL-CIO Building and Construction Trades Department, in his testimony to Congress regarding a recent unsuccessful effort to amend the LMRA to prohibit double-breasting (simultaneous ownership and operation of union and non-union construction companies). Georgine testified that in the construction industry:

> *[N]ational agreements represented only a minuscule percentage of collective bargaining agreements* . . . a total of approximately 9,500 local agreements and only 185 national or multistate agreements, the latter representing *under two percent* of the total number of agreements. And even that percentage is artificially inflated, as dozens (or even hundreds) of individual employers may sign or assent to a single collective bargaining agreement between a local union and a multi-employer association.

BNA Daily Labor Report (March 5, 1987). Thus, even accepting the questionable thesis that application of a universally-accepted doctrine such as fraud creates a possibility of varying standards from state to state, the problem is not of national importance.[7]

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[7] The Union also suggests that the identical conduct was subjected to varying standards under federal versus state law in this case. Not true. The Business Agent told two *different* lies. The District Court applied *its understanding* of federal law to one, state law to the other. Since there are no specific statutory guidelines defining fraud in the LMRA, a court *must*

(Continued on following page)

3. THE DECISION BELOW IS CORRECT: UNDER THIS COURT'S DEVELOPMENT OF SECTION 301, A STATE LAW FRAUD CLAIM ARISING COMPLETELY OUTSIDE ANY COLLECTIVE BARGAINING RELATIONSHIP AND NOT BASED IN ANY WAY ON THE CONTENT OF THE ALLEGED COLLECTIVE AGREEMENT IS NOT PREEMPTED MERELY BECAUSE THE TORTFEASOR IS EMPLOYED BY A LABOR UNION.

The decision below is nothing more than a straightforward application of the test for § 301 preemption repeatedly endorsed by this Court: when "the state law claim can be resolved without interpreting the agreement itself," there is no preemption. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 421 (1988) ("*Lingle*").

In *Lingle*, the Court reversed the Seventh Circuit's conclusion that a state law claim alleging retaliatory discharge for filing a worker's compensation claim was preempted because it was "inextricably intertwined" with a collective bargaining provision prohibiting discharge without just cause. The Supreme Court specifically *rejected* the Seventh Circuit's analysis that the state law claim was pre-empted because it "implicates the same analysis of facts as would an inquiry under the just cause provisions." The Court ruled:

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look to relevant state law. *See, DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). California law permits recovery for negligent misrepresentation and therefore that theory should have applied to the § 301 claim as well as the state law claim – a point which Respondents argued below but obviously had no reason to appeal.

> [E]ven if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, *as long as the state law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 pre-emption purposes.* [Emphasis added.] Id.

This conclusion is nothing new, as the Court's citation of *Caterpiller, Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425 (1987); *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985); and *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962) shows.

The Union's sweeping assertion that matters relating to "contract formation" are within the ambit of § 301 and therefore automatically pre-empted is no different than the Seventh Circuit's mistaken conclusion that § 301 pre-empts merely because the same general set of facts is implicated by a state law claim as would be implicated by a § 301 claim. The Union argues that simply because the Business Agent is employed by a union and his lies occurred within a few minutes of each other, § 301 must control. *Lingle* holds that such an analysis begs the question. The inquiry is whether the claim requires interpretation of a collective bargaining agreement. The conclusion that the Business Agent lied when he told Wilson the General required him to sign an Owner-Operator form requires no such analysis.

The Union's characterization of the issue as one of "contract formation" is not only irrelevant, it is mistaken. The Union ignores the central conclusion in this case, reached by the jury upon three weeks of evidence: *Wilson had no idea* that the document the Business Agent tricked

him into signing had anything to do with collective bargaining. There was no haggling over terms, no give and take. There was a brief exchange premised upon what the jury found to be an outright lie: the false statement that the General required Wilson to sign an Owner-Operator form in order to take the dirt on that job.

Application of § 301 to such facts would miss the point of preemption. The salient passage from *Lucas Flour* is the one that explains the reason for preemption: the need for "individual contract terms" to have a uniform meaning so that parties who are *negotiating* and *administering* collective agreements have a clear and consistent understanding of the private labor law they are creating.

> The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal system to promote industrial peace. State law which frustrates the efforts of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy.

Teamsters v. Lucas Flour Co., 369 U.S. 95, at 103-104.

It is evident from the Court's consistent use of words such as "free," "voluntary," and "consensual," that the Court is speaking to situations where two parties knowingly sit down at the bargaining table. The intercourse between Wilson and the Business Agent was not the mutual, knowing negotiation of a collective agreement envisioned by Congress and discussed in *Lucas Flour*.

United Steelworkers of America v. Rawson, ___ U.S. ___, 58 L.W. 4556 (1990) is not to the contrary. Like *all* of the

cases the Union cites, it arose squarely in the context of an established collective bargaining relationship. The Court's statement of the issue at stake is instructive:

> We granted certiorari in this case because [it] . . . raised important questions about the operation of federal and state law in *defining the duties of a labor union acting as a collective bargaining agent*. (Emphasis added.)

58 L.W. at 4557. The lawsuit, filed by the estates of several employees killed in a mine explosion, was based on the claim that the union had, through a collective bargaining agreement with the employer, established a joint management labor safety committee, and that the union, through its representatives on the committee, had negligently inspected the mine.[8]

The *Rawson* result rests upon the fact that a union performing its obligations to the employees it represented under the terms of a collective bargaining agreement it negotiated undertook to inspect a mine and then did a poor job of it. The Court took pains to note that "[t]his is not a situation where the Union's delegates are

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[8] The result in *Rawson* is merely a straightforward application of *Electrical Workers v. Hechler*, 481 U.S. 851 (1987), which holds that an employee's state law tort suit against her union for breach of the union's duty of care was governed by federal law where the duty allegedly arose from the collective bargaining agreement between union and employer. The *Rawson* decision is premised on the conclusion that the plaintiffs were asserting exactly the same type of claim as in *Hechler*: "The only possible interpretation of these pleadings, we believe, is that the duty on which respondents relied as the basis of their tort suit was one allegedly assumed by the Union in the collective bargaining agreement." *Rawson*, 58 U.S.L.W. at 4558.

accused of acting in a way that might violate the duty of reasonable care owed to every person in society." 58 U.S.L.W. at 4558.

Compare that to our case. Our case is premised on exactly the kind of general duty, owed by all persons to other persons, that *Rawson* was not. As an example, if the superintendent of the General had falsely told Wilson that he was required to sign an Owner-Operator form to work on the site, the Wilsons would have sued him under exactly the same theory. The Wilsons' suit for fraud in the inducement does not draw its shape from the fact that a union business agent lied about the necessity for what the Union characterizes as a pre-hire contract. The suit draws its essence from the fact that a person (not necessarily a union agent) lied to Wilson about the need to sign a piece of paper (it could have been any piece of paper – a waiver, a permit, and so on, the list is endless.)[9]

The Ninth Circuit correctly applied § 301 law to this case. Recognizing that "there is nothing novel about recognizing that substantive rights in the labor relations context can exist without interpreting collective bargaining agreements" (*Lingle*, 486 U.S. at 411), the Court found that interpretation of the alleged agreement was

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[9] The Union also cites *Dowd Box v. Courtney*, 368 U.S. 502 (1962), but it does not speak to our situation either: "The sole question presented by this case is whether [§ 301] operates to divest a state court of jurisdiction over a suit for violation of a contract between an employer and a labor organization." 368 U.S. at 503. (The answer, by the way, is no.) There was no state law claim in the case; it did not present the Court an opportunity to rule on the test for § 301 preemption of state law rules.

not required to resolve the Wilsons' fraud claim. That finding is completely consistent with this Court's decisions, and the unique facts of this case.

CONCLUSION

As explained, there is no reason to grant certiorari in this case. The petition for a writ of certiorari should be denied.

Dated: July 30, 1991

Respectfully submitted,

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